ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

1995

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	CS Docket No. 95-61
Competition in the Market for the	)	
Delivery of Video Programming	)	

DOCKET FILE COPY ORIGINAL

REPLY COMMENTS OF VIACOM INC.

VIACOM INC.

Lawrence W. Secrest
Peter D. Ross
Wayne D. Johnsen

Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Its Attorneys

July 28, 1995

TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY 1

II. THE RECORD DOES NOT SUPPORT ANY FCC RECOMMENDATION THAT THE PROGRAM ACCESS RULES BE EXTENDED BEYOND THEIR ORIGINAL SCOPE 2

A. The Rationale of the Program Access Rules Jusitifes Their Application only to Program Services Owned by or Affiliated with Cable Operators 2

B. There is no Cause for the Commission to Revisit Program Access Issues it Only Recently Decided After Extensive Proceedings 7

III. THE COMMISSION SHOULD ENSURE THAT LEC ENTRY PROVIDES PROGRAMMERS WITH A TRANSMISSION PATH FREE OF ARTIFICIAL BARRIERS TO CONSUMERS 10

IV. CONCLUSION 12

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	CS Docket No. 95-61
Competition in the Market for the	)	
Delivery of Video Programming	)	

REPLY COMMENTS OF VIACOM INC.

Viacom Inc. ("Viacom"), by its attorneys, hereby submits its reply to comments filed in response to the above-referenced Notice of Inquiry ("NOI"). Viacom finds that the record in this proceeding underscores the significance for programmers and consumers alike of public policy actions that promote competition in the video distribution marketplace -- and that the extension of program access rules would not serve, but rather only frustrate, that end.

I. Introduction and Summary

As demonstrated more fully below, Viacom submits that (i) the record provides no basis for extending the scope of the program access rules to program services owned by or affiliated with local exchange carriers ("LECs") or to other program services not vertically integrated with cable operators; (ii) the Commission should reject calls to revisit previously decided issues concerning implementation of the program access provisions of the 1992 Cable Act; and

(iii) the Commission should ensure that the entry of LECs into the provision of video programming offers programmers a transmission path free of artificial barriers to the consumer.

II. The Record Does Not Support Any FCC Recommendation that the Program Access Rules Be Extended Beyond Their Original Scope

A. The Rationale of the Program Access Rules Justifies Their Application Only to Program Services Owned by or Affiliated With Cable Operators

In its initial comments in this proceeding, Viacom urged the Commission to recognize that no basis exists for extending the program access rules to program services owned by or affiliated with LECs or other non-cable entities. The program access rules were expressly designed for the purpose of constraining the perceived market power of cable operators.[1] Proponents of extending the program access rules offer no justification for attempting to regulate activity beyond that intended to be addressed by the program access rules, while several commenters agree with Viacom that extension of the rules is

---

[1] Comments of Viacom at 3-6. Except as otherwise noted, all references to "Comments" contained herein are to comments filed on or about June 30, 1995 in response to the Commission's Notice of Inquiry in CS Docket No. 95-61 (rel. May 24, 1995).

unwarranted and would harm the programming industry to the ultimate detriment of consumers.[2]

Several commenters support Viacom's view that the program access rules represent a deliberately targeted intrusion into the workings of the programming marketplace -- not to regulate programming per se, but rather to ensure that cable operators do not exploit their ownership of program services to impede the development of competing multichannel video programming distributors. This fundamental premise of the program access rules is made explicit not only by the legislative history of the 1992 Cable Act, but also by the express language of Section 628 -- which applies the rules only to satellite delivered program services in which a cable operator has an attributable interest.[3] The Act thus reflects the legislative conclusions that cable operators have the incentive and ability to use their programming interests to impede the development of competition to cable

---

[2] See Comments of Lifetime Television at 6-8; Comments of ESPN at 2-4; Comments of CNBC, et al. ("CNBC") at 6; Comments of Group W Satellite Communications, Inc. ("Group W") at 3-4; Comments of National Cable Television Association ("NCTA") at 38.

[3] See, e.g., Comments of ESPN at 5-6; Comments of CNBC at 3. As several commenters -- including some that seek extension of the rules -- have noted, the Commission currently lacks authority under the 1992 Cable Act to extend the scope of the rules on its own initiative and thus would have to obtain a change in the statute before doing so. See, e.g., Comments of The Wireless Cable Association International, Inc. ("WCA") at 18.

systems, and that program services unaffiliated with cable operators do not have -- and certainly could not exercise -- any such anticompetitive advantage.

The limited scope of the program access rules was thus a matter of explicit design, not oversight. Programmers which are not owned by or affiliated with cable operators are inherently supportive of robust competition in the video distribution business, as their own fate depends on maximizing the distribution of their program services.

Moreover, several commenters confirm Viacom's view that extension of the program access rules would create a chilling effect on investment in programming.[4] Viacom believes that any extension of the rules would serve to discourage investment in both new and established program services. Indeed, Time Warner Cable ("TWC") notes that Time Warner has not invested in any new conventional cable programming services since the passage of the 1992 Cable Act.[5] Furthermore, CNBC notes the unintended consequences that the Commission's cable rate regulations had on the programming industry and raises legitimate concerns that similar results are all the more likely in the event that regulations that directly affect the programming industry are extended.[6]

---

[4] See, e.g., Comments of CNBC at 6.

[5] Comments of TWC at 24-25.

[6] Comments of CNBC at 5-6.

Arguments to the contrary amount to little more than calls for superficial parity or a governmental thumb on the scale in heretofore arms' length negotiations in the programming marketplace. For instance, HBO strongly argues that the program access rules are unnecessary, yet it asserts that if HBO must live under such rules, so too should all program suppliers -- regardless of their ownership.[7] HBO, of course, ignores the fundamental distinction which Congress and the Commission recognized between vertically integrated and non-vertically integrated programmers. HBO argues that non-universal application of the rules places vertically integrated programmers at a disadvantage. While Viacom certainly does not deny that the program access rules impose a burden on the programmers subject to them, artificial parity is no justification for grafting such regulations onto programmers with no cable ownership or affiliation who have no interest in impeding the development of competition to cable.[8] As demonstrated by Viacom in its comments here and in the ongoing video dialtone proceeding, the extension of the program access rules to LECs

---

[7] Comments of HBO at 24.

[8] Indeed, as BellSouth Telecommunications, Inc. ("BellSouth") argues in its comments, regulations that fail to take into account the fact that the LECs do not dominate the video programming marketplace merely serve to impede LEC entry. Comments of BellSouth at 4-7.

would not promote, but rather would undermine, the development of competition to traditional cable operators.[9]

While acknowledging that the underlying basis of the program access rules is to regulate potentially anticompetitive activities of cable operators, certain alternative distributors would like the Commission to empower them with the regulatory sword of the program access rules even in arms' length negotiations with programmers with no cable ownership interest.[10] WCA, for example, states that the program access rules should be extended because "all programmers, whether or not vertically integrated, are subject to the market power of wired cable."[11] These program access expansionists argue that because large cable operators are able to use their market power to extract below-market rates from all programmers, the Commission should provide other distributors with below-market rates as well. In effect, these parties urge the Commission to find that the proper way to deal with the market power they believe large cable operators exert over programmers is to extend the benefit of

---

[9] Comments of Viacom at 5; see also Reply Comments of Viacom Inc., CC Docket No. 87-266 (filed Apr. 11, 1995) at 36.

[10] See Comments of WCA at 16-18; Comments of PrimeTime 24 at 5-6; Comments of Satellite Receivers, Ltd. ("SRL") at 5; and Comments of National Cable Television Cooperative, Inc. ("NCTC") at 7.

[11] Comments of WCA at 17.

that market power to all distributors. They argue, in essence, for punishing not the perpetrators, but rather the victims. Yet no programmer -- particularly one lacking the benefits of MSO ownership -- could sustain a vibrant, or even viable, program service on such an uneconomic basis. Thus, as a matter of both economics and fairness, the position of those urging extension of the program access rules cannot withstand scrutiny. In sum, the record fails to demonstrate that such an extension would enhance competition, and any call to extend the scope of the rules should accordingly be rejected.

B. There is No Cause for the Commission to Revisit Program Access Issues it Only Recently Decided After Extensive Proceedings

FCC implementation of the program access provisions of the 1992 Cable Act was completed only after the submission of voluminous comments, a full airing of the issues by the Commission, and, in several respects, extensive reconsideration proceedings as well. With no good cause, the National Rural Telecommunications Cooperative ("NRTC") and Satellite Receivers, Ltd. ("SRL") now urge the Commission to revisit those decisions yet again.

Specifically, NRTC and SRL urge the Commission to reconsider its decision that damages are not currently available for program access violations.[12] This issue was, of course, exhaustively reviewed by the

---

[12] Comments of NRTC at 10-12; Comments of SRL at 2.

Commission in its reconsideration of its program access rules. Indeed, while the Commission first ruled that it did not have the authority to award damages as a remedy, on reconsideration the Commission determined that it would need no legislative change in order to award damages.[13] As a matter of policy, however, the Commission determined that it should not do so. The Commission found that such a remedy was unnecessary because "the sanctions available . . ., together with the program access complaint process, are sufficient to deter entities from violating the program access rules."[14]

---

[13] Viacom reserves the right to contest this finding should the need arise.

[14] Video Programming Distribution and Carriage (Reconsideration), 76 RR2d 1085, 1191 (1994) ("Recon. Order"). Viacom will also briefly comment on another issue raised in the comments of SRL. SRL contends that home satellite dish ("HSD") distributors, including Viacom's Showtime Satellite Networks, that are affiliated with programmers are selling packages of programming to HSD consumers at prices which are lower than the wholesale costs incurred by independent packagers for such programming. Comments of SRL at 2-3. It is SRL's view that "programmer affiliated packagers" are able to do this because they can subsidize the price of their packages through the margins built into their own program services which are sold as part of such packages that also contain program services of third parties. Id. Viacom submits that SRL, which would have the Commission establish the minimum profit margin on programming sales and thereby effectively set a floor on the retail price of programming to HSD consumers, is urging the Commission to take on a role far beyond that contemplated by the statute. Viacom submits that the FCC has no authority to do this and, further, that SRL has not made a case for such an unprecedented intrusion into the distribution marketplace. Rather, all that SRL's examples prove is that there is robust competition in HSD retail distribution to the benefit of HSD consumers -- just the sort of competition the program access rules sought to achieve. Any attempt to regulate the profit

(continued...)

While the Commission has reserved the right to revisit its decision if evidence is submitted that damages are needed to ensure compliance with the program access rules, NRTC and SRL have failed to provide any evidence that was not previously considered by the Commission when it made its policy determination only seven months ago. Indeed, as the Commission acknowledged in the NOI, there have been very few program access complaints filed since the rules went into effect nearly two years ago.[15] As the Commission has previously concluded, this demonstrates that the program access rules are successfully working to achieve Congress' goals.[16] Accordingly, there is no reason to revisit this issue at this time.

NRTC also seeks further review of the Commission's decision to allow vertically integrated programmers to enter into exclusive contracts with non-cable

---

[14](...continued)
margins of the various distributors would only harm HSD (and potentially other) consumers through the imposition of higher prices for program services -- precisely the opposite of what Congress intended. (Of course, Viacom is unaware of SRL's, or any other HSD distributor's, wholesale costs and therefore cannot address the factual basis for SRL's claim.)

[15] NOI at ¶90, n.146. SRL's argument that lack of ability to obtain damages removes the incentive to file complaints ignores the long-term prospective benefits to be gained by a successful program access complainant and improperly assumes that, absent the threat of damages, programmers have no reason to comply.

[16] See Recon. Order, 76 RR 2d at 1091.

distributors.[17] The Commission -- responding to NRTC's earlier petition for reconsideration and voluminous responsive filings -- properly concluded that these types of exclusive arrangements can be pro-competitive and should not be flatly prohibited.[18] NRTC raises nothing new and thus provides the Commission no reason to revisit an issue that it has only recently decided after extensive review.

III. The Commission Should Ensure that LEC Entry Provides Programmers with a Transmission Path Free of Artificial Barriers to Consumers

A number of commenters, primarily LECs, have taken the opportunity presented by this NOI to address the appropriate FCC framework for the provision by LECs of video programming directly to consumers within their telephone service areas.[19] As a programmer seeking maximum distribution of its product, Viacom has consistently urged the Commission to promote robust competition in the multichannel video programming distribution marketplace.

---

[17] Comments of NRTC at 8-9.

[18] Memorandum Opinion and Order on Reconsideration of the First Report and Order, MM Docket No. 92-265, FCC 94-326 (rel. Dec. 23, 1994) at ¶39,42.

[19] See, e.g., Comments of SBC Communications Inc. at 4; Comments of National Telephone Cooperative Association ("NTCA") at 5; Comments of BellSouth at 2-8; and Comments of NYNEX Telephone Companies at 2-6.

Viacom believes that a broadened role for LECs can substantially expand consumer choice and competition in multichannel video distribution. Indeed, Viacom has participated extensively in the FCC's video dialtone proceedings and, in reply here, wishes simply to highlight its views on how the Commission should seek to maximize the competitive potential of LEC entry into the video distribution marketplace.

To the extent the Commission preserves a viable Title II route for LEC entry, Viacom has urged the Commission to ensure that the set-top box, channel allocation schemes and certain channel sharing requirements are not used in an anticompetitive fashion that could undermine the video dialtone promise of open access for and nondiscrimination against programmers or packagers not affiliated with the LEC.[20] To the extent that the Commission's framework will permit (and quite possibly encourage) LEC entry as a Title VI cable operator, Viacom

---

[20] Comments of Viacom International Inc., CC Docket No. 87-266 (filed Dec. 16, 1994) at 2-10; Comments of Viacom Inc., CC Docket No. 87-266 (filed Mar. 21, 1995) at 16-26; Reply Comments of Viacom Inc., CC Docket No. 87-266 (Apr. 11, 1995) at 24-33; Opposition of Viacom International Inc. to Petition for Reconsideration of Ameritech Operating Companies and Liberty Cable Company, CC Docket No. 87-266 (filed Feb. 9, 1995) at 9-11. Viacom has previously detailed its views, in particular, on the need for the Commission to ensure that neither evolving digital transmission technology nor the set-top box (or other functionally equivalent network elements) be allowed to emerge as artificial barriers between programmers and consumers on LEC (or other distribution) networks.

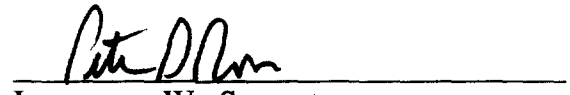
has emphasized the need for the Commission to effectively apply and tailor to LECs existing safeguards for unaffiliated programmers seeking fair access to distribution.

IV. Conclusion

For the reasons set forth above, Viacom submits that the record provides no reasoned basis for either broadening program access rules beyond their original scope or revisiting yet again other program access rulings that the Commission rendered recently and only after extensive deliberation. Finally, Viacom urges the Commission to ensure that programmers are able to benefit from increased competition in the video distribution marketplace by ensuring a transmission path to consumers free of artificial barriers for programmers.

Respectfully submitted,

VIACOM INC.

By: 

Lawrence W. Secrest
Peter D. Ross
Wayne D. Johnsen

of

Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000
Its Attorneys

July 28, 1995